Supreme Court, U.S.
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No. 91-1177

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LYNNE C. CZARNESKI,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner's Reply to Brief in Opposition

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The "Brief for the Respondent in Opposition" filed by the government in this matter ignores entirely the illegality of petitioner's trial counsel being allowed to testify as a material witness without petitioner's knowledge. The government's response also makes misstatements to this Court about the facts of this case.

The government's response totally fails to address the matter of the Tax Court improperly allowing petitioner's trial counsel to testify as a material witness, a matter that petitioner was totally unaware of until she discovered such fact after petitioner's trial counsel had lodged her appeal on other issues. By allowing her

trial counsel to testify as a material witness, the Tax Court permitted violations of Rule 3.7 of the Rules of Professional Conduct of the American Bar Association, which is incorporated into Rule 201(a) of the Tax Court Rules of Practice and Procedure, which in turn is required to be complied with by I.R.C. §§ 7452 and 7453. The Tax Court's permitted violation of the law in such manner was inconsistent with its decision in *Duffey v. C.I.R.*, 91 T.C. 81 (1988). The Ninth Circuit's refusal to consider the violation of law permitted by the Tax Court because it was not first raised by petitioner's trial counsel is a gross legal error as discussed in the petition filed in this matter. I.R.C. § 7482(c)(1); *Hormel v. Helvering, C.I.R.*, 312 U.S. 552, at 558 (1941).

The government's response incorrectly attempts to couch petitioner's complaint as only having to do with the absence of any waiver of a conflict of interest by petitioner. The illegality of what the Tax Court permitted went beyond a mere conflict of interest issue. Permitting trial counsel to testify as a material witness was a denial of due process to petitioner and erroneous as a matter of law. It is not something that is even susceptible to being waived or consented to as are some conflicts of interest. *Duffey v. C.I.R.*, 91 T.C. 81 (1988). The Ninth Circuit had the authority under I.R.C. § 7482(c)(1) and this Court's decision in *Hormel v. Helvering, C.I.R.* to correct the Tax Court's permitted violations of the law by rendering a decision holding that the conduct of the trial was illegal and remanding the matter to the Tax Court to be tried in accordance with the law.

These same authorities cited by petitioner would also permit the Ninth Circuit to remand the matter of the absence of a waiver of conflict of interest by petitioner to the Tax Court. The government's attempt to relegate the Tax Court and the Ninth Circuit's error to concern only a conflict of interest, however, is merely an attempt to make the error appear less egregious than it

is. Furthermore, the government's discussion of whether one has a constitutional right to effective assistance of counsel in a civil case is merely diversionary and is not applicable to the issues in this case.

The government and the Ninth Circuit have also failed to address the fact that petitioner could not have raised at trial the impropriety of her trial counsel's dual role as material witnesses. This was because she was unaware of the trial to begin with and unaware of her trial counsel's dual role and the Tax Court's erroneous allowance of such dual role until after the very same trial counsel had lodged an appeal on other grounds. The government knows that petitioner was divorced from her husband approximately one year before the petition was filed, that she was unaware of not only the trial taking place but also the docketing of her appeal by her trial counsel and she never signed any waiver of a conflict of interest. Her trial counsel did such things without her knowledge and misrepresented to the Tax Court that she had signed a waiver of any conflict of interest. Her trial counsel even admitted in their opening brief to the Ninth Circuit that "[a]ll actions taken with respect to the transactions that are the subject of this appeal were taken by the male appellants only." (Opening Brief for Appellant, Ninth Circuit, p. 1.) The government's ignoring of these facts is an attempt to deny petitioner a fair opportunity to litigate her innocent spouse defense under I.R.C. § 6013(e). Unfortunately this is a recurring inequity for divorced women whose ex-husbands and their representatives ignore their rights and continue to handle the joint tax return litigation as they originally handled the filing of the joint tax return, i.e., without any knowledge of the wife. This is the very reason Congress passed the innocent spouse provision of I.R.C. § 6013(e)[1].

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[1] At Footnote 7, page 8, of the "Brief for the Respondent in Opposition" the government misrepresents that petitioner signed a power of attorney authorizing Hochman, Salkin & DeRoy to represent her. The power of attorney only appointed Hochman, Salkin & DeRoy to

To allow the decisions against petitioner to stand would be a great miscarriage of justice. Additionally, this Court should correct the Ninth Circuit's position in this case that it did not have the authority to correct the violations of law and denial of due process that took place in the Tax Court.

March 25, 1992

Respectfully submitted,
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represent petitioner's ex-husband, Don A. Czarneski, before the Internal Revenue Service and had nothing to do with representing anyone in U.S. Tax Court. In fact, Treasury Regulation § 601.509 (as amended in 1980) specifically provides that a power of attorney is not to be used by a party litigant before the U.S. Tax Court.